

May 22, 2014

Christopher Drop
General Manager
Manila CSD
1901 Park Street
Arcata, CA 95521

Re: Your Request for Informal Assistance
Our File No. I-14-052

Dear Mr. Drop:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ This advice is limited to the provisions of the Act and does not consider other conflict of interest laws that may apply, such as common law conflict of interest. Because your questions are general in nature, we are treating your request as one for informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Further, because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. In addition, we do not render advice based on past conduct.

QUESTIONS

1. May you participate in service decisions applicable to property within 500 feet of your residence if your residence *receives* new or improved services?
2. May you participate in service decisions applicable to property within 500 feet of your residence if your residence *will not* receive new or improved services?
3. How is the 500 feet measured with respect to topography?
4. Are you legally required to participate in certain decisions?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

5. What other exceptions may apply to your circumstances?

FACTS

You provided the following facts.

- You are the General Manager and the only employee of the Manila Community Services District (the “district”). You are not an elected official.
- The population of the district is about 750 and the district serves roughly 350 homes. The area of the district is about .6 square miles.
- You own a one-acre parcel in the district that is your personal residence. It abuts the Manila Community Center (southern property line) and district-owned sand dunes (western line).
- Your personal residence utilizes the same water/wastewater system that the rest of the community uses.
- As General Manager, you may be called upon to evaluate repairs and improvements to the facilities in the district. You stated that you advise on such matters as the installation of gates, change of hours of operation, eviction of messy or noisy tenants from the property, eliminating light pollution, change rents or improve, increase or otherwise make improvements to the Community Center facilities.
- Because you are the only employee of the board, there is no other staff to author budgets, advise the board, make recommendations or otherwise participate in the basic policy decisions.

CONCLUSIONS AND ANALYSIS²

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable³ that the decision will have a material financial effect on one or more of the public official’s interests.⁴ (Section 87103.)

² Amendments to Regulations 18705.2 and 18706 were adopted by the Commission and will be submitted to the Office of Administrative Law for review. Although not currently effective, the regulations express the Commission’s policy concerning application of the conflict of interest rules of the Act. Therefore, staff is advising consistent with the Commission’s policy.

³ A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably

You have identified one interest that may result in a conflict of interest for you -- your ownership of a one-acre parcel in the district that is your personal residence.

1. May you participate in service decisions applicable to property within 500 feet of your residence if your residence receives new or improved services?

You may not participate in service decisions applicable to property within 500 feet of your residence if your residence receives new or improved services unless the new and improved services you receive are indistinguishable from improvements and services that are provided to or received by other similarly situated properties.

Revised Regulation 18705.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is deemed to be material. The decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan;

“(2) Determines the parcel’s zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision, or other boundaries, other than elective district boundaries as determined by the California Citizen’s Redistricting Commission or any other agency where the governmental decision is to determine boundaries for elective purposes;

“(3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;

“(4) Authorizes the sale, purchase, or lease of the parcel;

“(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, that real property. For purposes of this paragraph, any financial effect resulting

foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.

⁴ You asked whether the district was able to change your position and its designation in the district’s code. However, the disqualification rule in Section 87100 applies to all “public officials,” including but not limited to those designated in the conflict of interest code. Thus, while you may request the district and the district’s code reviewing body modify your required disclosure, it would not reduce or effect potential disqualification based on conflicts of interest.

from a governmental decision regarding permits or licenses issued to the official's business entity when operating on the official's real property shall be conclusively analyzed under Regulation 18705.1, rather than this paragraph, without any separate consideration for any material financial affects on the official's real property as a result of the decision;

“(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official's jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision;

“(7) Would change the development potential of the parcel of real property;

“(8) Would change the income producing potential of the parcel of real property. However, if the real property contains a business entity, including rental property, and the nature of the business entity remains unchanged, the materiality standards under Regulation 18705.1 applicable to business entities would apply instead;

“(9) Would change the highest and best use of the parcel of real property in which the official has a financial interest;

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

Assuming your property will receive new or improved services from any hypothetical decision, Regulation 18705.2(a)(6) would apply. However, the provision also requires that the new and improved services provided to the official be indistinguishable from improvements and services that are provided to or received by other similarly situated properties. In other words, so long as the official will not receive a disproportionate benefit or detriment by the decision, the official will not have a conflict of interest.

2. May you participate in service decisions applicable to property within 500 feet of your residence if your residence will not receive new or improved services?

Even where the other provisions of Regulation 18705.2 do not apply, the revised regulation also recognizes that under some circumstances, if the decision concerns a subject

property within 500 feet of the official's property, the effect may still be considered material. Regulation 18705.2(a)(11) provides:

“Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property”

The new regulation differs from the old regulation in that it does not apply a “one-penny” rule, but rather focuses on the facts and circumstances of the decision. Moreover, officials may request, and the Commission will provide, written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property.

You stated that as General Manager you may be called upon to evaluate repairs and improvements to the facilities in the district, you advise on such matters as the installation of gates, changes of hours of operation, eviction of messy or noisy Community center tenants, elimination of light pollution, changes to rents or improve, increase or otherwise make improvement to the Community Center facilities. Generally speaking, these types of decisions related to the community center appear to be of such a minor nature that they will have no measurable effect on the value of your property despite the proximity of your property to the community center.

3. How is the 500 feet measured with respect to topography?

The 500 foot rule is measured in a direct line from the nearest boundary of the subject property to the nearest boundary of the official's property. It is the direct distance between these two points without regard to the contour of intervening terrain.

4. Are you considered legally required to participate?

You ask whether you may still participate in decisions in which you have a conflict of interest based on the exception for legally required participation. The exception for legally required participation is in Section 87101 and Regulation 18708. Regulation 18708 provides:

“(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

“(b) . . .

“(c) This regulation shall be construed narrowly, and shall:

“(1) Not be construed to permit an official, who is otherwise disqualified under Government Code section 87100, to vote to break a tie.

“(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code section 87100, whether or not such other members are actually present at the time of the disqualification.

“(3) Require participation by the smallest number of officials with a conflict that are ‘legally required’ in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.

“(d) . . .”

You state that as General Manager of the district, you have specific duties for which you may find you have a conflict of interest. However, the “legally required participation” exception allows an official to participate in a decision notwithstanding a conflict of interest, only if there exists no alternative source of decision *consistent with the purposes and terms of the statute authorizing the decision*. (Section 87101.) For example, in *Brown v. Fair Political Practices Commission* (2000) 84 Cal.App.4th 137, the court found that the then mayor of Oakland could participate in redevelopment decisions despite a conflict of interest. The court stated:

“We emphasize that such a sweeping exemption would be inappropriate for officers with more circumscribed roles, or those who are only one of a number of members of an agency, or those who can be replaced by someone who may function in their place consistently with the terms of the governing law. Under Oakland’s charter, the mayor’s role in redevelopment projects is unique and essential to the balance of power between himself, the council, and the city manager.

“Because our holding is limited to this particular set of circumstances, we disagree with the FPPC’s claim that applying the rule of legally required participation in this case will ‘open the floodgates to other exception claims.’ The FPPC suggests that other cities will come forward with similar claims, and more ‘strong mayor’ charters might emerge. Since this case and *Feinstein* have been the only cases involving ‘strong mayors’ with conflicts of interest since the PRA’s enactment in 1974, we are skeptical that any such flood is imminent. Nor do we

believe voters are likely to approve 'strong mayor' charters merely for the purpose of circumventing the conflict of interest statute."

While the court limited the decision to the strong-mayor issue before them, they did suggest that the rationale could apply to other officials. They cautioned, however, that the "exemption would be inappropriate for officers with more circumscribed roles, or those who are only one of a number of members of an agency, or those who can be replaced by someone who may function in their place consistently with the terms of the governing law."

In your case, you are the General Manager of the CSD and the only employee of the agency. Thus, there is no one that can act in your place consistent with the terms of the governing law and therefore the exception applies.

5. What other exceptions may apply?

Regulation 18707.1: Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his real property interest, the official may still participate under the "public generally" exception if the financial effect of the decision on the official's property is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.) The analysis to determine if the "public generally" exception applies to a given decision involves the determination of whether a significant segment of the jurisdiction is affected by the governmental decision in "substantially the same manner" as the official.

Regulation 18707.1(b)(1)(B) provides (for real property) that a significant segment is:

"(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official's agency or the district the official represents; or

"(ii) 5,000 property owners or residential property owners in the jurisdiction of the official's agency."

You stated that the district population is about 750 and the district serves roughly 350 homes. The area is about .6 square miles. Thus, a significant segment of the population would be 75 individuals. A significant segment of the residential properties would be 35 homes. Consequently, if a decision would affect 75 people or 35 homes in substantially the same manner as it would affect your interests, the public generally exception would permit you to participate in the decision.

Regulation 18707.10: In pertinent part, Regulation 18707.10 provides:

"(a) The effect of a governmental decision on the residential real property that is the domicile of a public official is not distinguishable from the effect on the public generally if all of the following conditions are met:

“(1) The jurisdiction of the public official’s agency has a population of 30,000 or less and covers a geographic area of ten square miles or less;

“(2) The public official is required to live within the jurisdiction;

“(3) The public official, if elected, has been elected in an at-large jurisdiction;

“(4) The official’s property is more than 300 feet from the boundaries of the property that is the subject of the governmental decision;

“(5) The official’s property is located on a lot not more than one-quarter acre in size or not larger than 125 percent of the median residential lot size for the jurisdiction; and

“(6) There are at least 20 other properties under separate ownership within a 500 foot radius of the boundaries of the property that is the subject of the governmental decision that are similar in value.”

In order to qualify for the public generally exception for small jurisdictions in Regulation 18707.10, an official’s residence must meet all six requirements under the regulation.⁵ (Regulation 18707.10(a).) Your district’s characteristics meet the first requirement. Assuming you are required to live in the district and your property is located on a lot not larger than 125 percent of the median residential lot size for the jurisdiction, you may participate in decisions that affect property beyond 300 feet from your property so long as there are at least 20 other properties, similar in value to yours, under separate ownership within a 500 foot radius of the subject property.”

I hope this general discussion of the law is of assistance. As specific decisions arise, you can contact us for formal written advice. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

⁵ Actually, in your case you need to only meet five requirements. Since you are not an elected official, subdivision (a)(3) is not applicable to you.